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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GOYAN WESLEY COLE, JR.,

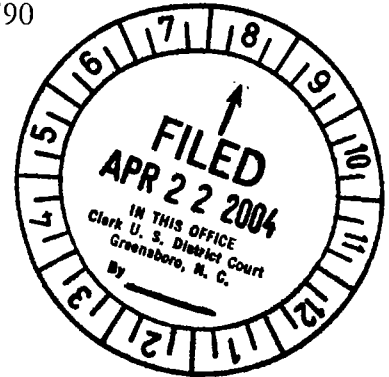
Plaintiff,

v.

ANTHONY J. PRINCIPI, SECRETARY
DEPARTMENT OF VETERANS
AFFAIRS, and
UNITED STATES OF AMERICA,

Defendants.

1:02CV00790



MEMORANDUM OPINION

BEATY, District Judge.

I. INTRODUCTION

Plaintiff Goyan Wesley Cole, Jr. ("Cole") filed this action on September 16, 2002, alleging claims of medical malpractice and negligence [Document #1]. As this action was brought under the Federal Tort Claims Act ("FTCA"), jurisdiction is proper in this Court. 28 U.S.C. §§ 1346(b), 2401(b) and 2672-80. Defendants Anthony J. Principi, Secretary of the Department of Veterans Affairs ("Principi") and United States of America then filed a Motion for Summary Judgment [Document #16], which the Court now considers.

II. FACTUAL BACKGROUND

In the light most favorable to Plaintiff, the relevant facts are as follows: Plaintiff, a veteran of the United States Navy, underwent a stapedectomy surgery on his left ear on October 10, 1991, at Durham Veterans Affairs Medical Center. The surgery was performed by Dr. David Hoyt and Dr. John McElveen. As a result of the surgery, Plaintiff unexpectedly lost hearing in his left ear. On October 15, 1991, Plaintiff traveled to Charleston, South Carolina with his current wife, Doris Martin Cole. During the trip, Plaintiff and Mrs. Cole visited the Veterans Affairs Medical Center in Charleston where he was diagnosed with Bell's Palsy, a condition which caused him to lose feeling

on the left side of his face and the sense of taste on the left side of his tongue. Plaintiff was informed by a doctor at the Veterans Affairs Medical Center in Charleston that the condition was a consequence of the stapedectomy surgery on his left ear. In December 1991, Plaintiff filed disability claims alleging that his Bell's Palsy and hearing loss in his left ear were caused by the stapedectomy surgery. In his claim for disability for his hearing loss, Plaintiff stated: "I am experiencing complete loss of hearing in my left ear, which has nerve damage. This loss is due to an operation on Oct. 10, '91 at VAMC Durham."

In December 1991 or January 1992, Plaintiff underwent a re-exploration of his left ear by Dr. McElveen at the Durham Veterans Affairs Medical Center. The re-exploration surgery revealed that the nerve in Plaintiff's ear was irreparably damaged and that he would not regain hearing in his left ear. Plaintiff testified in his deposition that Dr. McElveen told him after the surgery that his hearing loss was permanent and he would not regain hearing in his left ear. On May 12, 1992, Dr. Andrew Coundouriotis of the Durham Veterans Affairs Medical Center wrote a letter to Plaintiff reviewing his medical situation. In the letter, Dr. Coundouriotis stated that Plaintiff's "hearing is permanently damaged secondary to nerve damage that occurred during the episode of labyrinthitis. In January 1992, the patient underwent re-exploration to confirm that the stapes prosthesis was appropriately placed and this was indeed identified at the time of surgery. No other causes of the patient's hearing loss could be identified."

On August 10, 1992, Dr. Shumway of Durham Veterans Affairs Medical Center wrote another letter which Plaintiff submitted in support of his disability claim. The letter stated:

John T. McElveen, Jr., MD, who was the attending surgeon, performed a left stapedectomy on October 9, 1991 on Mr. Goyan W. Cole, Jr. The patient's post-operative follow-up was complicated by left otitis media in which he was noted to have left facial weakness and a "profound" hearing loss. Mr. Cole was re-explored in December of 1991 by Dr. McElveen as the attending physician and has had a recent follow-up audiogram which shows that he still possesses a "profound" left sensorineural hearing loss. His hearing loss on the left is considered 100% and the loss is the result of his postoperative

sequelae from the left stapedectomy in October, 1991.

Plaintiff subsequently filed an FTCA claim on May 17, 1995. Defendants contend that Plaintiff's claim should be dismissed because he failed to file his FTCA claim within the applicable statute of limitations.

III. DISCUSSION

A. Motion to Dismiss Principi as an Improper Party

As an initial matter, Defendants move to dismiss Principi as an improper party to this action. The Court agrees that in an action under the FTCA, the exclusive proper defendant is the United States, and an action against an individual employee of the United States is improper. 28 U.S.C. §§ 2671 *et seq.*; Messino v. McBride, 174 F. Supp. 2d 397, 399 (D. Md. 2001). Therefore, Defendant Principi is hereby dismissed. The United States will be referred to hereafter as the sole defendant.

B. Summary Judgment Standard of Review

Summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of showing the absence of any issues of material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Under this standard, a genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). As a result, the Court will only enter summary judgment in favor of the moving party when “the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the [nonmoving] party cannot prevail under any circumstances.” Campbell v. Hewitt, Coleman & Assocs., 21 F.3d 52, 55 (4th Cir. 1994) (quoting Phoenix Sav. & Loan, Inc. v.

Aetna Cas. & Sur. Co., 381 F.2d 245, 249 (4th Cir. 1967)). However, “a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” Anderson, 477 U.S. at 256, 106 S. Ct. at 2514. In reviewing the underlying facts, all inferences must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). However, the evidentiary materials must show more than a “scintilla of evidence” from which the finder of fact could reasonably find for the non-moving party. Anderson, 477 U.S. at 252, 106 S. Ct. 2505.

C. Application of the Statute of Limitations

The Government’s sole contention on summary judgment is that Plaintiff failed to file his FTCA claim within the applicable statute of limitations. In reviewing a claim under the FTCA, “[s]tate law determines whether there is an underlying cause of action; but federal law defines the limitations period and determines when that cause of action accrued.” Miller v. United States, 932 F.2d 301, 303 (4th Cir. 1991). The FTCA provides that “[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues” 28 U.S.C. § 2401(b); United States v. Kubrick, 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979); Kerstetter v. United States, 57 F.3d 362 (4th Cir. 1995). As this Court noted in Doe v. United States, “[t]he FTCA constitutes a limited waiver of sovereign immunity, and satisfying the two-year statute of limitations is a ‘key jurisdictional prerequisite’ to suit that cannot be waived.” Doe v. United States, 280 F. Supp. 2d 459, 464 (M.D.N.C. 2003) (citing Kubrick, 444 U.S. at 117-18, 100 S. Ct. at 357). Thus, in order for Plaintiff’s claim to avoid being barred by the statute of limitations, it must have been brought within two years of the date from which the cause of action accrued.

“Accrual of a claim in medical malpractice occurs when the plaintiff became aware--or would have become aware through the exercise of due diligence--both of the existence of injury and of its

cause.” Kerstetter, 57 F.3d at 364. “A plaintiff possesses this knowledge when he becomes aware of ‘the critical facts that he has been hurt and who has inflicted the injury.’” Doe, 280 F. Supp. 2d at 464 (citing Kubrick, 444 U.S. at 122, 100 S. Ct. at 359). For a claim to accrue, the plaintiff does not need to know the precise medical reason for the injury, if the plaintiff is aware that the injury was caused by a particular medical procedure. Kerstetter, 57 F.3d at 364. Further, the plaintiff does not need to know that the injury was caused by the negligence of another, “nor have a legal understanding of the nature of the claim.” Holland v. United States, No. 1:02CV00395, 2004 WL 234665, at *2 (M.D.N.C. Jan. 22, 2004); accord Lekas v. United Airlines, Inc., 282 F.3d 296, 300 (4th Cir. 2002). “This standard requires that a plaintiff have only ‘elemental knowledge’ of his claim, not that he possess ‘complete knowledge of all elements or a legal understanding of the nature of the claim.’ In short, the cause of action accrues upon inquiry notice.” Doe, 280 F. Supp. 2d at 464 (citing Nasim v. Warden, Md. House of Corr., 64 F.3d 951, 955 (4th Cir. 1995) and Lekas, 282 F.3d at 299).

The rule establishing when FTCA claims accrue was decided by the United States Supreme Court in the case of Kubrick. In Kubrick, the plaintiff, a veteran, was admitted to the Veterans Administration hospital for treatment on his infected right femur in April 1968. Kubrick, 444 U.S. at 114, 100 S. Ct. at 355. During surgery, neomycin, an antibiotic, was used to treat the infection. Id. Approximately six weeks later, the plaintiff noticed a ringing sensation in his ears and some loss of hearing. Id. at 114, 100 S. Ct. at 355. He was later diagnosed with bilateral nerve deafness and informed by January 1969 that it was highly possible that the hearing loss was the result of the neomycin treatment administered at the hospital. Id. The Veterans Administration hospital denied the plaintiff benefits based on his allegation that neomycin caused his deafness, and it was not until June 1971 that a private physician definitively told the plaintiff that the neomycin caused his injury and that neomycin should not have been administered. Id. The plaintiff filed suit under the FTCA in 1972. Id. at 115–16, 100 S. Ct. at 356. The district court rendered judgment for the plaintiff,

rejecting the Government's argument that the plaintiff's claims were barred by the two-year statute of limitations, and the Third Circuit Court of Appeals affirmed. Id.

The United States Supreme Court reversed, holding that the plaintiff filed suit after the two-year statute of limitations had run. Id. at 125, 100 S. Ct. at 361. The Court held that a claim arises when the plaintiff knows both of the existence and the cause of his injury, regardless of when he determines that the acts inflicting the injury were negligent. Id. at 117-24, 100 S. Ct. at 357-61. Therefore, the plaintiff's cause of action had accrued in January 1969 when he first learned his hearing loss may have resulted from the neomycin. Id. In so holding, the Court stated: "[T]he limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." Id. at 117, 100 S. Ct. at 357.

Applying the Kubrick standard to the case at bar, the facts show that Plaintiff knew "both of the existence and the cause of his injury" more than two years before he filed his FTCA claim. Plaintiff was fully aware that his surgery had resulted in deafness almost immediately after it was performed. He was informed as early as October 15, 1991, that he may have suffered Bell's Palsy as a consequence of the stapedectomy surgery. Plaintiff was clearly aware of the possibility that his hearing was permanently lost as a result of the stapedectomy surgery in December 1991 when he filed disability claims for the injury. That knowledge was reaffirmed in December 1991 or January 1992 after he was informed by Dr. McElveen that the re-exploration surgery revealed that the nerve in Plaintiff's ear was irreparably damaged and that he would not regain hearing in his left ear. Finally, the fact that Plaintiff had inquiry notice of his injury is clear from two letters written to Plaintiff from his doctors on May 12, 1992, and August 10, 1992. These letters, one of which Plaintiff submitted in support of his disability claim, indicated that his hearing was permanently damaged. By the time Plaintiff received this last letter from Dr. Shumway on August 10, 1992, it can be said with certainty that Plaintiff should have been aware of both the "existence and cause of

his injury.” Nevertheless, Plaintiff did not file his FTCA claim until May 17, 1995, more than two years later. As a result, absent a finding that the date of accrual of his FTCA claim was tolled, Plaintiff’s claim is barred by the statute of limitations.

D. The Continuous Treatment Doctrine’s Effect on the Statute of Limitations

Although not raised in his pleadings, Plaintiff asserts in his Memorandum In Opposition to Defendants’ Motion for Summary Judgment [Document #18] that his cause of action did not accrue before he filed his Complaint [Document #1] because of the continuous treatment doctrine. Under the continuous treatment doctrine, the statute of limitations does not begin to run on a medical malpractice claim “so long as the claimant remains under the ‘continuous treatment’ of a physician whose negligence is alleged to have caused the injury; in such circumstances, the claim only accrues when the ‘continuous treatment’ ceases.” Miller v. United States, 932 F.2d 301, 304 (4th Cir. 1991). “The continuous treatment doctrine is based on a patient’s right to place trust and confidence in his physician. Under the doctrine, the patient is excused from challenging the quality of care being rendered until the confidential relationship terminates. Stated another way, the doctrine permits a wronged patient to benefit from his physician’s corrective efforts without the disruption of a malpractice action.” Otto v. NIH, 815 F.2d 985, 988 (4th Cir. 1987) accord Holland, 2004 WL 234665, at *3.

Plaintiff asserts this doctrine should be applied to toll the statute of limitations in this case, citing the case of Otto, in which the Fourth Circuit recognized the continuous treatment doctrine. In Otto, the plaintiff underwent surgery to remove her “bad parathyroid” glands, in light of her family history of hyperparathyroidism. Otto, 815 F.2d at 986. After the surgery, the plaintiff learned that her doctors had also removed all of her “good” parathyroid glands, except for one-half of a “good” parathyroid gland. Id. One of her doctors noted that they were removed “to see if the human body could function without them,” but that a portion of her “good” parathyroid tissue had been frozen in case a transplant to reinsert it became necessary. Id. Plaintiff suffered complications

from the surgery, but continued to be treated by the same physicians, in part because there were very few facilities capable of treating her medical condition. Id. at 987. Plaintiff underwent two additional surgeries attempting to reinsert her previously frozen “good” parathyroid material, both of which were unsuccessful. Id. It was only after the second unsuccessful transplant, seventeen months after the initial surgery, that she learned that nothing more could be done for her. Id. The Plaintiff brought an FTCA claim within two years of her last surgery, but more than two years from the alleged malpractice, the initial surgery in which her parathyroid glands were removed. Id.

The Fourth Circuit held that the plaintiff’s claim was not barred by the FTCA’s two-year statute of limitations. Id. at 989. The court found, “[i]t was only during the second transplant in April, 1981, that [the plaintiff] learned that nothing more could be done for her and that she would experience permanent hypocalcemia if this procedure proved unsuccessful. Given these facts, [the plaintiff’s] claim for malpractice could not have accrued until after the second transplant when she became aware of the true nature of her permanent and irreparable injury.” Id.

Comparing the instant case to Otto, Plaintiff’s injury was caused during the stapedectomy surgery on his left ear on October 10, 1991. Plaintiff continued to be treated at the Durham Veterans Affairs Medical Center until December 1991 or January 1992 when he underwent a re-exploration of his left ear by Dr. McElveen. Plaintiff testified in his deposition that Dr. McElveen told him after the surgery that his hearing loss was permanent and he would not regain hearing in his left ear. Just as in Otto, Plaintiff’s cause of action accrued at the point at which he “became aware of the true nature of [his] permanent and irreparable injury.” Id.; see also Miller, 932 F.2d at 305 (holding the continuous treatment doctrine applies only to situations in which later negligence on the part of the treating physician could have contributed to the specific cause of injury upon which the plaintiff’s claim is based). Thus, even if the Court applied the continuous treatment doctrine to the Government’s remedial efforts after Plaintiff sustained his injury, the doctrine would only serve to delay the accrual of Plaintiff’s cause of action until immediately after the re-exploration

surgery in December 1991 or January 1992. Either of these dates is still more than two years prior to when Plaintiff filed his complaint on May 17, 1995.

After the re-exploration surgery in December 1991 or January 1992, the only treatments Plaintiff alleges he received were yearly ear exams and service for a hearing aid. Unlike the subsequent surgeries in Otto, which were attempts to reverse injuries caused by the physicians' initial negligence, Plaintiff's ear exams and hearing aid service do not constitute a "physician's corrective efforts," but they were merely efforts to help Plaintiff cope with the permanent injury. As such, these efforts are outside the scope of the continuous treatment doctrine as defined in Otto. Therefore, the latest date upon which Plaintiff could be considered to be under the "continuous treatment" of Defendant for the injury at issue was the date of the re-exploration surgery, December 1991 or January 1992. Given that Plaintiff did not file his FTCA claim until May 17, 1995, Plaintiff failed to file his FTCA claim within two years of August 10, 1992, as previously discussed, the last date on which Plaintiff should have been aware of both the "existence and cause of his injury." Thus, Plaintiff's action is not saved by the continuous treatment doctrine, but rather it is barred by the two-year statute of limitations applicable to FTCA claims. Plaintiff's FTCA claim, therefore, must be dismissed because of the statute of limitations bar.

E. Plaintiff's Motion to Amend Complaint

As a final matter, on March 17, 2004, Plaintiff filed a Motion to Amend Complaint [Document #27], seeking leave to add the claims of: (1) failure to obtain a valid consent to perform surgery; (2) fraud in the inducement on the basis that Defendant induced Plaintiff to have the stapedectomy surgery by misrepresenting the risk of injury to Plaintiff; and (3) negligence on the basis that Defendant negligently failed to advise Plaintiff of the risks of the surgery. On April 7, 2004, Defendant filed a Response to Plaintiff's Motion to Amend Complaint [Document #32].

Generally, motions to amend a complaint are governed by Rule 15(a) of the Federal Rules of Civil Procedure which requires that "leave shall be freely given when justice so requires." Fed.

R. Civ. P. 15(a). However, when the motion to amend is presented after the time provided for amendment by the scheduling order, Rule 16(b) is implicated. Studio Frames, Ltd. v. Village Ins. Agency, No. 1:01CV00876, 2003 WL 1785802, at *1 (M.D.N.C. Mar. 31, 2003). Under Rule 16(b), Plaintiff must make a “showing of good cause” before the schedule can be amended to allow further amendment of the complaint. Fed. R. Civ. P. 16(b). When a motion to amend implicates both Rule 15(a) and Rule 16(b), “it is necessary to consider first whether [Plaintiff] satisfies the ‘good cause’ standard of Rule 16(b) before deciding whether [Plaintiff] satisfies the more liberal standard of Rule 15(a).” Studio Frames, 2003 WL 1785802, at *1 accord Dewitt v. Hutchins, 1:03CV00337, 2004 WL 609294, at *3 (M.D.N.C. Mar. 23, 2004).

“Good cause” under Rule 16(b), may be shown if the “plaintiff uncovered previously unknown facts during discovery that would support an additional cause of action,” Forstmann v. Culp, 114 F.R.D. 83, 86 (M.D.N.C. 1987), or if the party moving to amend shows that despite the “exercise of reasonable diligence,” the evidence supporting the proposed amendment would not have been discovered until after the amendment deadline had passed. Studio Frames, 2003 WL 1785802, at *2. However, even if the opposing party would not be prejudiced by the modification of a scheduling order, good cause is not shown if the amendment could have been timely made. Forstmann, 114 F.R.D. at 85; Dewitt, 2004 WL 609294, at *3. Plaintiff offers no evidence that “good cause” exists for his delay in his Motion to Amend Complaint [Document #27]. Therefore, the Court has no basis for a finding that “good cause” to allow the amendment exists within the meaning of Rule 16(b).

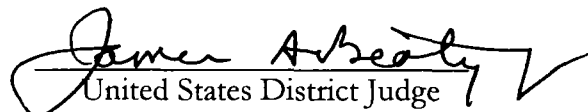
Further, assuming *arguendo* that “good cause” could be shown under Rule 16(b), the motion would still be denied under Rule 15(a). Rule 15(a) of the Federal Rules of Civil Procedure provides that “a party may amend the party’s pleadings only by leave of court or by written consent of the adverse party; and leave shall be given freely when justice so requires.” Fed. R. Civ. P. 15(a). However, such leave need not be given where the amendment will cause undue prejudice to the

opposing party, is made in bad faith or will be futile. Foman v. Davis, 371 U.S. 178, 182, 82 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962); Davis v. Piper Aircraft Corp., 615 F.2d 606, 613 (4th Cir. 1980); Shinn v. Greeness, 218 F.R.D. 478, 486 (M.D.N.C. 2003). The additional claims Plaintiff attempts to add to his Complaint, arise from the same series of events discussed above and, like Plaintiff's current claims, would also arise under the FTCA. Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981) (holding claims that Government doctors failed to properly advise, counsel, and test the plaintiff in the course of her medical treatment are medical malpractice claims governed by the FTCA). As such, the additional claims would also be barred by the FTCA's two-year statute of limitations. Therefore, the Court finds that allowing Plaintiff to amend his Complaint to allege the additional claims as described here would be futile. Thus, Plaintiff's Motion to Amend Complaint [Document #27] is denied.

IV. CONCLUSION

In summary, Defendants' Motion to Dismiss as to Defendant Principi is granted as the United States is the only proper party to an FTCA claim. Further, because Plaintiff did not file his Federal Tort Claims Act action within two years of the date on which his cause of action accrued, Defendants' Motion for Summary Judgment [Document #16] is granted in all respects. Finally, because allowing Plaintiff to amend his Complaint would be futile, Plaintiff's Motion to Amend Complaint [Document #27] is denied. An Order and Judgment consistent with this Memorandum Opinion shall be filed contemporaneously herewith.

This, the 22nd day of April, 2004.


United States District Judge